ARKANSAS COURT OF APPEALS
NOT DESIGNATION FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION I

CACR08-1105

May 6, 2009

	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT,
DANIEL G. PRICE APPELLANT	SEVENTH DIVISION [CR-2007-3000]
V.	HONORABLE BARRY SIMS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant, Daniel Price, at his arraignment on April 25, 2007, pleaded not guilty in CR 2007-1052 to endangering the welfare of a child. Bond of $1,000 was set, and Price was given notice to appear for an omnibus hearing on July 20, 2007. On that day, although his attorney appeared, Price did not; after calling the case twice, the trial court issued an alias warrant. The omnibus hearing was reset for July 25; Price appeared, his bond was revoked, and a new bond of $10,000 was instated. Price bonded out and attended all other hearings related to his case, including his trial in January 2008, where he was convicted of felony endangering the welfare of a child and sentenced to six years in the Arkansas Department of Correction.

On July 26, 2007, the Pulaski County Prosecuting Attorney filed an information against Price, charging him with violation of Arkansas Code Annotated section 5-54-120 failure to appear, a Class C felony, in connection with his missed omnibus hearing on July 20, 2007. Price filed a motion in limine, arguing that the failure-to-appear charge should be dismissed because the statute only applied when the non-appearance was to answer a felony charge or for disposition of any felony charge, and that his failure to appear at the omnibus hearing did not fall into either category. In this motion, Price also admitted that he did not appear for his July 20, 2007 omnibus hearing. At the hearing on this charge, the trial court deemed Price's motion in limine a motion to dismiss and denied it. The State introduced the felony information, the docket sheet, the notice of the omnibus hearing on July 20, 2007, at 8:30 a.m., and the judgment and commitment order in CR 2007-1052. The State called no witnesses and rested. Price again moved for dismissal, arguing that he could only be charged with failure to appear in violation of § 5-54-120 if the required appearance was to either answer a felony charge or for disposition of any felony charge. The trial court denied the renewed motion.

Price called four witnesses in his defense. David Cannon, Price's attorney at the time of the July 20, 2007 omnibus hearing, testified that he was in court that day when Price's case was called, but Price was not there, so, thinking that Price was just late, he requested that the case be placed toward the bottom of the docket. Cannon said that he called the numbers he had for Price. When he got no response, he then called his secretary, who contacted Price's father. Cannon stated that he received a call from Price

later, but that it was after the case had been recalled a second time. According to Cannon, the case was recalled for the second time between 9:30 and 10:00. The trial judge then issued a warrant for Price's arrest. When Cannon spoke to Price, he told him that a warrant had been issued and he should not come to court because it was too late. Cannon admitted that he did not ask the trial court to reconvene and recall the warrant on July 20, and that he made no attempt to recall the case other than when it was called a second time.

Andrea Holliman, Cannon's secretary, testified that Cannon called her on July 20, 2007 between 8:45 and 9:15 about Price not appearing for court. She attempted to locate Price, eventually speaking with his father. She said that Price called her fifteen to thirty minutes after she talked to his father, and she told him that he should go to court; Price told her that he was out of town and would try to get there.

Amanda Robinson, Price's girlfriend, testified that she and Price spent the night of July 19 at her mother's house in Mayflower; that they left Mayflower about 7:30 on the morning of July 20; and that they were at a friend's house in North Little Rock about 8:00 that morning. Robinson testified that they thought the hearing was July 25, not July 20. She said that they were getting ready to go to court on July 20, but that Cannon called and told Price to "lay low" because there was a warrant out for his arrest. Robinson claimed that this conversation took place around 8:30 a.m. She also stated that Price asked to come to court, but Cannon told him no, that he would get another court date set.

Price testified that the telephone calls from Holliman began taking place at around 8:30; that Holliman called him and told him that a warrant had been issued for him; and that he tried to call Cannon but could not get in touch with him. According to Price, when he talked to Cannon and asked if the trial judge would see him, Cannon told him that it was too late, that a warrant had already been issued for his arrest, and that he would get Price a new hearing. Price said that he did not show up on July 20 because he was told not to do so by Cannon, and that he never missed another hearing. Finally, Price claimed that Cannon's time frame regarding the phone calls was not accurate. Price's counsel again moved to dismiss the charges, which was again denied by the trial court. The trial court then found Price guilty of felony failure to appear and sentenced him to six years in the Arkansas Department of Correction, with the sentence to run consecutively to the endangerment sentence he was already serving.

Price now appeals his conviction for felony failure to appear. He makes five arguments on appeal:

> (1) The language of Ark. Code Ann. § 5-54-120 is plain and unambiguous and Appellant should not have been charged with a felony failure to appear; (2) The Circuit Court should have exercised its powers of contempt for Appellant's non-appearance at an omnibus hearing; (3) The sentence of six years, consecutive, for Appellant's failure to appear at an omnibus hearing is overly harsh and disproportionate to the offense cited; (4) Criminal statutes, specifically, Ark. Code Ann. § 5-54-120, should be narrowly construed; (5) A finding of guilt is contrary to the facts.

Due to double-jeopardy concerns, we must address Price's sufficiency-of-the evidence argument first, even though it is his fifth argument on appeal. *McDuffy v. State*,

359 Ark. 180, 196 S.W.3d 12 (2004). Price argues that a finding of guilt is contrary to the facts because he did not willfully miss the omnibus hearing on July 20, 2007, but rather was told by his attorney not to attempt to come to court that day because a warrant had been issued and it was too late. This argument is not preserved for appellate review, as it was not made to the trial court in his motion to dismiss. Rather, the only argument made below was that the omnibus hearing was not dispositive and therefore the charges against Price should be dismissed. Rule 33.1(c) of the Arkansas Rules of Criminal Procedure requires that motions for dismissal based on insufficiency of the evidence must specify how the evidence is deficient, and failure to do so constitutes a waiver of this argument. Price did not make this argument below, therefore he is barred from now making it to this court.

Price's first and fourth arguments, that the language of Ark. Code Ann. § 5-54-120 is plain and unambiguous and he should not have been charged with a felony failure to appear and that criminal statutes, specifically, Ark. Code Ann. § 5-54-120, should be narrowly construed, are best discussed together. Price contends on appeal, as he did below, that the statute is only applicable when a defendant fails to appear to answer a charge of felony or for disposition of any felony charge. Arkansas Code Annotated section 5-54-120 (Repl. 2005), provides, in pertinent part:

> (a) A person commits the offense of failure to appear if he or she fails to appear without reasonable excuse subsequent to having been:
>
> (1) Cited or summonsed as an accused; or

> (2) Lawfully set at liberty upon condition that he or she appear at a specified time, place, and court.
>
> (b) Failure to appear is a Class C felony if the required appearance was to answer a charge or for disposition of any felony charge either before or after a determination of guilt on the felony charge.
>
> . . .
>
> (d) This section does not apply to an order to appear imposed as a condition of suspension or probation pursuant to § 5-4-303 or an order to appear issued prior to a revocation hearing pursuant to § 5-4-310.

Price is correct in his assertion that criminal statutes are strictly construed. In *Williams v. State*, 364 Ark. 203, 208, 217 S.W.3d 817, 819-20 (2005) (citations omitted) (citing *Hunt v. State*, 354 Ark. 682, 686, 128 S.W.3d 820, 823 (2003)), our supreme court held:

> The basic rule of statutory construction, to which all other interpretive guides must yield, is to give effect to the intent of the legislature. In interpreting a penal statute, "[i]t is well settled that penal statutes are strictly construed with all doubts resolved in favor of the defendant, and nothing is taken as intended which is not clearly expressed." However, even a penal statute must not be construed so strictly as to defeat the obvious intent of the legislature. In this regard, we will not construe penal statutes so strictly as to reach absurd consequences which are clearly contrary to legislative intent.

As Price argues, a person can be charged under section 5-54-120 only if he fails to appear "to answer a charge of felony" or "for disposition of any felony charge." Ark. Code Ann. § 5-54-120(b). He contends that he cannot be charged under this statute because the omnibus hearing at which he failed to appear does not fall into either category. However, the full text of subsection (b) states, "Failure to appear is a Class C felony if the required appearance was to answer a charge or for disposition of any felony charge either before or after a determination of guilt on the felony charge." Here, the trial court determined that all omnibus hearings prior to a determination of guilt were part of

the disposition of a felony charge. Furthermore, Arkansas Rule of Criminal Procedure 20.1 requires an omnibus stage, to be "supervised by the trial court and requiring court appearance when necessary." Under Rule 20.3 of the Arkansas Rules of Criminal Procedure, typical issues to be addressed at omnibus hearings include motions or other requests, procedural or constitutional issues, and changes of plea. Although issues of statutory construction are reviewed *de novo* and the appellate courts are not bound by a trial court's decision regarding the meaning of a statute, "in the absence of a showing that the trial court erred in its interpretation of the law, that interpretation will be accepted as correct on appeal." *Potter v. City of Tontitown*, 371 Ark. 200, 209, 264 S.W.3d 473, 480 (2007).

We hold that the trial court properly interpreted the statute and affirm its interpretation. For us to do otherwise would lead to absurd results contrary to legislative intent. As pointed out by the State, some omnibus hearings are dispositive, while others are not, and an adoption of Price's construction would lead to this statute not being uniformly applied. We further reject Price's assertion that we should follow his citations of Delaware, Texas, or federal law, in making distinctions between dispositive and nondispositive hearings.

Price also cites *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006). However, that case addressed another statute, Ark. Code Ann. § 16-96-508 (Repl. 2006), which deals with a defendant's failure to appear at trial when appealing from district court. Therefore, it has no application to this set of facts.

Price next argues that the trial court could have applied its criminal contempt powers instead of convicting him under section 5-54-120. However, it is not the trial court, but rather the prosecuting attorney, who determines the charges to be filed against an accused. *State v. Brooks*, 360 Ark. 499, 202 S.W.3d 508 (2005). Absent a finding that section 5-54-120 was inapplicable, the trial court had to honor the prosecutor's decision to charge Price under this statute. Furthermore, had the trial court charged Price with criminal contempt, that would not prohibit the prosecuting attorney from filing failure-to-appear charges. Pursuant to Arkansas Code Annotated section 16-10-108(e) (Supp. 2007), "[a] person punished for contempt under subsections (a)-(d) of this section shall, notwithstanding, be liable to an indictment for the contempt if the contempt is an indictable offense[.]"

Price's last argument is that the sentence was overly harsh. This issue is not preserved for appeal because Price did not object to the six-year sentence at the time he was sentenced. This court will not consider an argument contesting a sentence if the appellant did not object below. *Ladwig v. State*, 328 Ark. 241, 943 S.W.2d 571 (1997).

Affirmed.

HENRY and BROWN, JJ., agree.